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BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C.



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| In the Matter of | ) | |
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| Implementation of Section 4(g) of the Cable Television Consumer Protection Act of 1992 | ) | MM Docket No. 93-8 |
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# COMMENTS OF THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

Format-based differences among stations provide no rational basis for different regulatory treatment. This is especially true with respect to must carry requirements which bear no relation to the content of programming. If a broadcast television station satisfies the public interest-based criteria applicable to all broadcast television stations, then its license should be renewed and its ability to assert local cable carriage rights under the must carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 should remain unimpaired. If, on the other hand, a broadcast television station fails to satisfy its public interest obligations such that its license may not be renewed, then the

Therefore, INTV urges the Commission to circumnavigate this regulatory swamp, treat all broadcast television stations alike regardless of format, and avoid any content or format-based distinctions with respect to their rights and obligations to operate in the public interest.[2]

*All* broadcast television stations must serve the public interest, convenience, and necessity. This basic obligation exists irrespective of a station's chosen programming format and never has been construed to vary based on the type of program format selected by a licensee. Indeed, with respect to home shopping stations, the Commission already has acknowledged that:

> Under current regulations, home shopping stations have the same fundamental obligation as other broadcast stations to provide programming that responds to issues of concern to their communities of license. Similarly, with regard to serving the needs and interests of children, home shopping stations must comply with the same rules that apply to other television broadcast stations.[3]

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or Congress? This only underscores that the Commission's current regulatory criteria for evaluating stations' performance under the public interest standard is both sufficient and sensible.

[2]The Association of Independent Television Stations, Inc. (INTV) submits these comments in response to the Commission's *Notice of Proposed Rulemaking* , MM Docket No. 93-8, FCC 93-35 (released January 28, 1993) [hereinafter cited as *Notice*]. Whereas the bulk of INTV's member stations have general audience entertainment formats, the disparate treatment of any broadcast station based on its programming format would be an especially troublesome precedent in a a dynamic and challenging video marketplace.

[3]*Notice* at ¶ 4. Indeed, the Commission was explicit with respect to application of the children's television requirements to home shopping stations, noting on further reconsideration that:

> We also clarified... that the commercial limits and the programming renewal review requirements imposed by the Act apply equally to all commercial stations, including home shopping stations.

*Memorandum Opinion and Order*, MM Docket Nos. 90-570 & 83-670, 7 FCC Rcd 3197 (1992).

Therefore, home shopping stations --- like any and every other broadcast television station -- are subject to the full range of public interest requirements imposed on broadcast television by the Commission.

Moreover, a station's performance in the public interest is strictly a matter of adherence to these basic public interest obligations. Program format has nothing to do with it. In deregulating television, the Commission stated expressly that:

> [T]he *only programming obligation* of a licensee should be to provide programming responsive to issues of concern to its community of license.[4]

The Commission observed that:

> [T]his approach will *fully meet* our current regulatory needs with respect to the programming performance of commercial television broadcasters, while permitting the elimination of unnecessary and often burdensome regulations.[5]

The Commission never has intimated that these requirements somehow might vary based on a station's programming format, be it home shopping or some other allegedly unconventional format.

The Commission consistently has applied the same standards to all television stations -- including home shopping stations -- in reviewing their performance in the public interest.[6] Thus, with respect to the critical factors by which the Commission evaluates the performance of television broadcast station in the public interest, programming format is irrelevant.

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[4]*Television Deregulation*, 98 FCC 2d 1076, 1091 (1984)[emphasis supplied]. The Commission also made it clear therein that, "[W]e are not in this proceeding relieving a licensee of all programming responsibilities." *Id.*

[5]*Id.*, 98 FCC 2d at 1077 [emphasis supplied].

[6]*E.g.*, *Family Media, Inc.*, 2 FCC Rcd 2540 (1987); *Office of Communications of United Church of Christ v. FCC*, 911 F. 2d 803 (D.C. Cir. 1990).

Moreover, compliance with these well-established and generally applicable public interest obligations was the focal point of the Congressional concern about according carriage rights to home shopping stations. In the words of Senator Breaux:

> [W]hen we talk about the privilege of having a broadcast license which, after all the spectrum belongs to the public -- it does not belong to any person -- there were certain policies and communications acts set up in order to make sure that these people who had a broadcast license, served the needs of the public. They talked about the public interest. They talked about promoting a diversity of views.
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> I would suggest that a station that broadcast commercials 24 hours a day or maybe 23 hours a day interspersed with the reprogramming of the same so-called public interest program, does not meet *that test.* They provide no weather, they provide no local news, they provide no local coverage of current events within a community. The only thing they do is run commercials.[7]

Later in the debate, Senator Breaux confirmed the concern underlying his amendment:

> My point is that it is wrong for this Congress to force a cable company to put on their system a station that does not in any stretch of the imagination meet the *traditional public interest, public need and necessity test.*[8]

Thus, whether Senator Breaux's impressions concerning the performance of home shopping stations were correct, his concern plainly related to the stations' compliance with the basic public interest obligations applicable to all stations, not with their format *per se.*

The task assigned the Commission in Section 4(g) reflects a similar distaste for format-based regulatory distinctions. The Commission is directed to determine whether home shopping stations "are serving the public interest, convenience and necessity."Congress in no way even suggested that the Commission determine that a format, in this case the home shopping format, was inherently infirm *vis-a-vis* the public interest standard. In the following colloquy with Senator Graham, Senator Breaux

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[7]*Congressional Record* (January 29, 1992) at S571 [emphasis supplied].

[8]*Id.* at S574 [emphasis supplied].

implicitly, but clearly, disavowed the theory that his amendment was directed at a station's choice of format:

> Mr. GRAHAM. If the theory is that there is something perverse about this type of broadcasting that does not warrant it being given the status of must carry, why should the cable operator be able to make two decisions: First, whether he wants to carry any or all of that type of programming; and, then, second, the right to pick and choose among similar cable operators.
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> Mr. BREAUX. I think the theory behind the bill -- and others may be able to speak to that -- requiring must carry for the networks, NBC, ABC, CBS, public television, or what have you, is that these programs on those stations meet the public interest, meet the public necessity, meet the standards by which a *normal station* is given a broadcast license...[9]

In other words, a station's compliance with long standing public interest obligations, not the format selected by the station, was the issue.

Senator Graham, whose amendment is reflected in Section 4(g), offered his amendment to place the matter before the Commission in large part because the Breaux amendment would have involved "the Congress in a very serious issue of content determination beyond that which has already been reached by the FCC."[10] Similar expressions of concern were voiced by other Senators. For example, Senator Reid stated:

> The amendment offered by the Senator from Louisiana makes a subjective judgment on content. What will be next? Will we, the U.S. Senate and House of Representatives, decide that religious programming should be banned from cable access? Will we want to take children's cartoons off the air? Or only certain kinds of cartoons?
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> Mr. President, I do not really think this is different than book burning -- maybe a little different in degree, but the same principle. We are

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[9] *Id.* at S573 [emphasis supplied].

[10] *Id.* at S580. As Senator Graham previously had stated during the debate:

> I believe we are going down a very slippery slope if Congress now has to say we are going to establish another set of standards and values on program content beyond that which we have previously assigned the FCC to make.

*Id.* at S574.

> saying, "We don't like this programming so nobody else should watch it either." And that is wrong.

Senator Danforth, an original sponsor of the Act stated:

> The second point, which is a broader point and a very important point, does have to do with content regulation and does have to do with whether we on the floor of the Senate want to make qualitative distinctions among various kinds of TV programming. Do want to say that if there is such a thing as must-carry, then that must-carry privilege extends to certain kinds of television content? That is what this amendment would do. It would say that there is certain content of television programming that we do not like and that we want to treat differently from other kinds of television programming. That, to me, is a highly questionable process for the Senate to enter.[11]

Senator Pressler expressed a like concern:

> I am very much concerned about the precedent this type of amendment would create. Is it now time for Congress to begin to regulate what Americans choose to watch? I think not. This amendment is clearly subjective content regulation.[12]

In light of these concerns, the Senate agreed to Senator Graham's amendment.[13] Thus, the Commission is not presented with a matter of format evaluation or format-based regulation, but of determining "in consistently applied administrative procedure, subject to judicial review" whether home shopping stations "are serving the public interest, convenience, and necessity."[14]

By avoiding any content-based determinations, the Commission would remain faithful not only to Congressional intent to avoid content-based must carry requirements, but also to the Commission's own sound policy of steering clear of format regulation. In its *Notice*, the Commission acknowledged its position in that regard:

> Moreover, the Commission traditionally does not take station format differences into account in formulating regulatory policy, a practice that

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[11] *Id.* at S579.

[12] *Id.* at S575.

[13] *Id.* at S586.

[14] *Id.* at S580.

> "reflects a reasonable accommodation of the policy of promoting diversity in programming and the policy of avoiding unnecessary restrictions on licensee discretion."[15]

This is an especially compelling policy in the case of unconventional formats. As the

INTV also submits several points for consideration by the Commission in this proceeding. First, the must carry rules implement a system of local broadcasting fostered by the Commission in its coherent, all-inclusive scheme of nationwide television channel allotments. The allotment scheme and the must carry requirements which preserve it from decimation are assiduously content-neutral. This is how Congress intended it and how it should remain.

Second, all stations are subject to anticompetitive decisions by cable systems to [illegible] their signals. Certainly, in the case of formats like home shopping

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